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May 29, 1997

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Federal Communications Commission
Office of Secretary

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: GC Docket No. 95-172

Dear Mr. Caton:

On behalf of Rainbow Broadcasting Company, there is transmitted herewith and filed an original and fourteen (14) copies of their "Reply to Exceptions of Press Broadcasting Company, Inc. and Separate Trial Staff".

Should any questions arise with respect to this matter, please contact the undersigned counsel.

Respectfully submitted,

KAYE, SCHOLER, FIERMAN, HAYS
& HANDLER, LLP

By: 

Bruce A. Eisen

Enclosure

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

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MAY 29 1997

Federal Communications Commission
Office of Secretary

In re Applications of)
)
RAINBOW BROADCASTING COMPANY) GC Docket No. 95-172
) File No. BMPCT-910625KP
For an Extension of Time) File No. BMPCT-910125KE
to Construct) File No. BTCCT-911129KT
)
and)
)
For an Assignment of its)
Construction Permit for)
Station WRBW(TV), Orlando, Florida)

TO: The Commission

RAINBOW BROADCASTING COMPANY'S
REPLY TO EXCEPTIONS OF
PRESS BROADCASTING COMPANY, INC. AND
SEPARATE TRIAL STAFF

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Counsel for
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May 29, 1997

SUMMARY

Three basic qualifications issues are specified against Rainbow Broadcasting Company (RBC), permittee of Television Station WRBW-TV at Orlando, Florida. A fourth issue was designated to inquire into whether or not a waiver of Section 73.3598(a) of the Rules was justified, or whether RBC was entitled to a grant of an extension of its construction permit pursuant to Section 73.3534(b) of the Rules.

Each of the basic qualifications issues were correctly resolved by an Administrative Law Judge in RBC's favor. RBC's principals had no involvement in alleged ex parte violations, and RBC's counsel had an honest belief that the proceeding was not restricted and that her contacts with the Commission's staff were permissible.

The ALJ also correctly concluded that RBC was financially qualified throughout the period of time covered by a financial misrepresentation issue, and that nothing had occurred during that period which would have required RBC to report to the Commission that it no longer could rely upon its lender.

An issue specified to determine whether or not RBC had misrepresented the nature of Florida tower litigation in construction permit extension requests was also correctly

resolved in RBC's favor. RBC's representations regarding the litigation were accurate, its controlling partner believed that RBC was prevented from construction by the court's status quo order.

Finally, since RBC never received a full 24-months after judicial review in which to construct its facility, it was entitled to a waiver of Section 73.3598 or an extension under the hardship provisions of Section 73.3534(b). In any event, RBC's actual construction efforts and the expenditure of substantial funds provided independent support for an extension under the "substantial progress" provision of the latter rule.

The Separate Trial Staff's attacks on the ALJ's Initial Decision are entirely unconvincing. Moreover, facts developed from the instant proceeding have been presented to the Commission in a separate matter relating to Press Broadcasting Company, Inc.'s application for renewal of license of Station WKCF-TV at Clermont, Florida. The ALJ recognized that substantial questions existed with regard to Press' collusion with RBC's tower owner. In fact, Press' misrepresentations and anticompetitive conduct is responsible for a number of the issues specified in this proceeding.

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Station WRBW(TV), Orlando, Florida)	

TO: The Commission

RAINBOW BROADCASTING COMPANY'S
REPLY TO EXCEPTIONS OF
PRESS BROADCASTING COMPANY, INC. AND
SEPARATE TRIAL STAFF

Rainbow Broadcasting Company ("RBC"), by its attorney, and pursuant to the Commission's Rules, hereby submits its Reply to the Exceptions filed on behalf of Press Broadcasting Company, Inc. ("Press") and the Separate Trial Staff. In support thereof, the following is shown.

I. Preliminary Statement

1. RBC filed an application for a new UHF television station at Orlando, Florida, on September 9, 1982. After a comparative hearing and subsequent agency appeals, the Commission

affirmed the grant of RBC's construction permit. Metro Broadcasting, Inc., 99 FCC 2d 688 (Rev. Bd. 1984); rev. denied, FCC 85-558 (released October 18, 1985). RBC's grant became a final order when the United States Supreme Court affirmed the constitutionality of the Commission's minority preference policies and denied rehearing on August 30, 1990. See, Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990), petition for rehearing denied, 497 U.S. 1050 (1990).¹ The instant proceeding followed a Court of Appeals remand to the Commission to determine facts and circumstances surrounding the above-captioned applications. See, Press Broadcasting Co., Inc. v. FCC, 59 F.3d 1365 (D.C. Cir. 1995).

2. A fair amount of background is provided by both Press and the Separate Trial Staff in their exceptions. However, neither of those parties mentions that the hearing which followed the Court's remand largely resulted from a pattern of abuse in which Press began to engage shortly after RBC's grant became final. Indeed, although an experienced Administrative Law Judge resolved all the hearing issues in RBC's favor, the specification of each of those issues derived from misrepresentations made to the Commission by Press, itself, in attempting to block RBC from

¹ Jt. Ex. 1, Stipulation No. 11.

taking its rightful place as a viable competitor in the Orlando market. See paragraph 7, infra.

3. By Memorandum Opinion and Hearing Designation Order, 61 Fed. Reg. 34282, January 31, 1996 ("HDO"), the Commission designated for hearing RBC's application for an extension of time in which to construct its television station as well as its application for assignment of its construction permit. The following issues were specified:

(1) To determine whether Rainbow intentionally violated §1.1208 and §1.1210 of the Commission's ex parte rules by soliciting a third party to call the Commission on Rainbow's behalf, and by meeting with Commission staff to discuss the merits of Rainbow's application proceedings.

(2) To determine whether Rainbow made misrepresentations of fact or was lacking in candor with respect to its financial qualifications regarding its ability to construct and initially operate its station, in violation of §1.17 and §73.1015 of the Commission's Rules or otherwise.

(3) To determine whether Rainbow made misrepresentations of fact or was lacking in candor regarding the nature of the tower litigation in terms of its failure to construct in connection with its fifth and sixth extension applications, in violation of §1.17 and §73.1015 of the Commission's Rules or otherwise.

(4) To determine whether Rainbow has demonstrated that under the circumstances either grant of a waiver of §73.3598(a) or grant of an extension under §73.3534(b) is justified.

(5) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether Rainbow is qualified to be a Commission licensee and whether grant of the subject applications serves the public interest, convenience and necessity.

4. After an evidentiary hearing had been held on these issues, Administrative Law Judge Joseph Chachkin released his Initial Decision, 12 FCC Rcd 4028 (ALJ 1997) ("I.D."), and resolved each of the issues in RBC's favor. Thus, the ALJ granted the captioned applications for an extension of construction permit and for an assignment of RBC's construction permit. In reaching his Findings and Conclusions, the ALJ made more than passing reference to the fact that Press may have engaged in practices inimical to Commission regulation. Indeed, the uncertainty, time and expense to the government as well as to RBC is attributable directly to Press' anticompetitive conduct and its willingness to dissemble facts to further its own goals.

II. The Tower Litigation Issues (Issues 3 and 4)

5. RBC's fifth and sixth extension applications each stated that actual construction "has been delayed by a dispute with the tower owner which is the subject of legal action in the United States District Court for the Southern District of Florida (Case No. 90-2554 CIV. MARCUS)". Jt. Ex. 2, p.3. Press and the

Separate Trial Staff spend an enormous amount of energy in an unsuccessful attempt to twist this statement out of general comprehension.

6. The "dispute" was a lawsuit which RBC initiated in November 1990 against Guy Gannett Publishing Company ("Gannett"), the owner of the tower with which RBC had reached an agreement to locate its antenna.² RBC sought a preliminary injunction against Gannett which had breached the tower lease agreement that provided RBC with an exclusive right to locate its antenna within the 1500 foot aperture of the tower. Gannett had wrongfully leased access to the 1500 foot level to Press. Press and the Separate Trial Staff contend that the extension applications failed to disclose that RBC had filed the lawsuit, that RBC chose to litigate in order to prevent competition from Press, and that in any event RBC had the power to dismiss the lawsuit so that it could commence construction at any time.

7. Nothing in RBC's extension requests was at odds with Rey's testimony or with the facts. RBC's lawsuit against the tower owner was meant to protect its contractual rights, not to delay construction. The ALJ saw through Press' charade and

² Joseph Rey, et al. v. Guy Gannett Publishing Co., et al., 766 F. Supp. 1142 (S.D. Fla. 1991) Jt. Ex. 1, Stipulation No. 12.

perceived serious questions regarding complicity between Press and the tower owner to keep RBC from entering the Orlando market before Press could.³ He rightly concluded that RBC had been truthful in its extension requests and that it had no intent to deceive the Commission. I.D., par. 113.

8. Press and the Separate Trial Staff contend that, as plaintiff, RBC's delay in construction was a voluntary matter within its control that cannot support an extension of a construction permit. Remarkably, the Separate Trial Staff observes that since RBC failed to specifically state in its extension requests that it was the plaintiff, it must have intended to deceive the Commission! That is preposterous. The Commission has never held that a broadcast permittee is unable to invoke important commercial obligations, especially where, as here, RBC had already expended very substantial funds pursuant to

³ The RBC principles have urged the Commission to follow-up on the ALJ's invitation to consider Press' wrongdoing in an independent proceeding. See, I.D., pars. 79, 114. They have filed a supplement to the petition to deny Press' application for renewal of license of Station WKCF-TV at Clermont, Florida. The supplement shows that Press and Gannett colluded in order to keep RBC from initiating operations as the fifth television station in the market. Even more damaging is the fact that Press knew that its arguments to the Commission opposing RBC's captioned applications were false. For its anticompetitive and abusive behavior, as well as for its misrepresentations, the WKCF-TV renewal application should be designated for a hearing as requested in the petition to deny.

a contract it believed to have been negotiated in good faith.

See, I.D., par. 88. To conclude otherwise, would force a permittee to go through the construction process even if it meant forfeiting basic contractual rights that would have compromised its ability to compete.

9. Press and the Separate Trial Staff further attack RBC's reliance on the district court "status quo" order as a reason not to have constructed. The ALJ, however, reasonably concluded that the status quo order prevented RBC from constructing on its own. I.D., par. 114. Moreover, Press incorrectly alleges that RBC somehow "abandoned" its reliance on Rey's recollection concerning the "status quo" statements of the district court judge (Tr. 804-805, 831, 836).

10. The ALJ was correct to conclude that RBC was entitled to a waiver of Section 73.3598(a) of the Rules or to a grant of an extension of its construction permit under Section 73.3534(b) of the Rules. See, I.D., pars. 121, 127. RBC's sixth extension request remained pending during a period of time when construction was precluded by circumstances beyond its control. During the time that RBC held an unexpired construction permit (10 months), it was unable to progress and complete construction because the tower owner refused to move forward. The ALJ noted,

however, that RBC had taken all possible steps to proceed since it had made significant lease payments, and undertaken pre-construction planning and the selection of equipment. I.D., par. 127. He found ample support for a waiver of Section 73.3598(a) because RBC had received less than the requisite 24 months to construct and concluded that this constituted hardship under Section 73.3534(b) of the Rules. I.D., par. 126.

11. The Separate Trial Staff gets caught up in what it characterizes as the law of the case of Press v. FCC, supra. It claims that the Court barred any question of an RBC waiver because it held that RBC was unquestionably required to apply and qualify for an extension. Press, 59 F.3d at 1372. The Separate Trial Staff is in error. Licensing policy rests with the Commission. When the agency designated this proceeding for hearing, it clearly and aptly stated that even if the Court had literally read Section 73.3598 of the Rules, Commission policy remains that television permittees are entitled to a two year construction period during which permits are neither in appellate litigation nor lapsed pending consideration of extension requests. See, KWOJ, 10 FCC Rcd 8774, 8775 (1995). In any event the Court, itself, observed that the Commission might determine that a waiver was justified if it found that the tower litigation

prevented RBC from beginning construction. Press, 59 F.3d at 1372.

12. The evidence developed on the hearing record showed that RBC failed to receive the full construction period, that it, nevertheless, strove to construct the station during the brief time that it held a valid construction permit, and that it was prevented from progressing by Press' collusive and anticompetitive activities. I.D., par. 127. When the relevant rules are measured in light of the facts adduced and the law applied under Issue 2, it is readily apparent that Section 73.3534(b) should be waived and that RBC made the proper showing under Section 73.3534(b)(3), i.e., that progress was prevented for reasons clearly beyond the control of RBC and that RBC had taken all possible steps to expeditiously resolve the problem and proceed with construction.

III. Financial Misrepresentation Issue (Issue 2)

13. RBC's financial qualifications were based upon an oral agreement between Rey and Howard Conant that had been reached in 1984 (Tr. 749-750), and RBC represented that it remained financially qualified when it filed its fifth extension

application on January 25, 1991.⁴ Press and the Separate Trial Staff maintain that the representation was knowingly untrue because Rey believed that RBC could obtain financing only if it prevailed in the lawsuit for a preliminary injunction against Gannett. They also argue that Rey's district court testimony showed that the financing had been "put on hold" because of the tower litigation. Press makes much of the district court Judge's conclusion that RBC had no financing whatsoever,⁵ and Press contends that the Conant agreement was financially insufficient.

14. The ALJ rejected these arguments. He correctly concluded that the oral agreement provided RBC with reasonable assurance of sufficient net liquid assets available to construct and operate the station for three months without revenue. He also determined that the agreement remained intact and was never withdrawn during the relevant period of inquiry, 1991 onward. I.D., pars. 43, 105.

15. The record evidence disclosed that Rey, at times during the tower litigation in Florida, believed that RBC's failure to obtain a preliminary injunction against Gannett would doom WRBW-

⁴ Jt. Ex. 2. The application form asks whether "all representations contained in the application for construction permit still are true and correct" (Jt. Ex. 2, p. 1).

⁵ 766 F. Supp. at 1145.

TV as the potential sixth market station because it would be unable to secure financing. That fear never materialized, so the notion that Rey's pessimism somehow rendered Conant's financial commitment "conditional" is senseless. Nothing that was developed on the district court record, and nothing which informed Rey's state of mind during the pendency of that proceeding, required RBC to amend its FCC application for an extension of its construction permit. The possibility of a condition subsequent, i.e., RBC's status as a sixth television station in the market, was not a matter which required disclosure.

16. In its Report and Order adopting Section 1.65 of the Rules, the Commission explained that an applicant must report a change in circumstances significantly altering its financial status so as to be pertinent to its financial qualifications. See, Reporting of Changed Circumstances, 3 RR2d 1622, 1625 (1964). There is a decisional difference between intellectual pessimism and the kind of overt act which directly impacts upon the financial qualifications of a broadcast applicant. Hence, some material matters may normally fluctuate -- not the least of which may be an applicant's thoughts on his proposal's viability -- over the very significant amount of time spent in the

application process. See, FEM Rey, Inc., 6 FCC Rcd 4238, 4240, f.n. 5 (Rev. Bd. 1991). There was no specific event here which triggered a need to report a loss of financial qualifications. Cf., Edwin A. Bernstein, 6 FCC Rcd 6841 (Rev. Bd. 1991) (bank letter rescinded); Paradise Broadcasting Communications Systems, Inc., 100 FCC 2d 387 (Rev. Bd. 1985) (applicant disqualified when land value, the basis of the financial showing, became encumbered), Belo Broadcasting Corp., 68 FCC 2d 1479 (1978) (applicant disqualified for, inter alia, failing to inform the Commission that withdrawing stockholders were no longer endorsing loan and that loan could no longer be obtained as a result).

17. Section 1.65 of the Rules addresses more than a mere possibility. It contemplates an actual, substantial change, not a belief for a few months that a project might possibly sour in the future. That is what occurred here. The record reflects that Rey's pessimism ended when new information came to light that showed the viability of even a sixth station in the Orlando market. By June 6, 1991, when the district court denied RBC's motion for a preliminary injunction, market conditions had changed significantly, and throughout the period RBC's financial commitment remained intact (RBC Ex. 5, p.1, par. 3).

Furthermore, RBC never violated Sections 1.17 or 73.1015 of the

Commission's Rules because it never misrepresented the facts surrounding its financial qualifications or lacked candor in any way. The record is clear in this regard and the ALJ's conclusions are entirely reasonable. I.D., par. 109 and f.n. 18.

18. Press unconvincingly cites Rey's testimony in the district court hearing. It considers dispositive the district court's observation that RBC had no financing whatsoever. But there is more to the district court judge's holding than that. His conclusion arose from his finding that RBC had no written financial document, a different set of circumstances than what is here at issue. The Commission does not require such documentation to support a financial certification. See, Emission de Radio Balmaseda, Inc., 8 FCC Rcd 4335 (1993). Press' argument that Rey had testified that the tower litigation had put the financing "on hold" is another example of its willingness to distort the facts. Rey's reference was to a delay in memorializing the agreement to writing, not to the existence of the specific terms of a financing agreement (Press Ex. 10, p.7).

19. The ALJ, of course, understood the substantially different measure of financial qualifications at issue before the district court and before the Commission. I.D., par. 112. The

tremendous burden of persuasion placed upon plaintiffs in a preliminary injunction hearing required the district court to take a divergent analytical posture to that of the Commission. The district court was free to ignore all but the strongest evidence in reaching its conclusion. As Judge Marcus noted, "a preliminary injunction is an extraordinary and drastic remedy." Rey v. Guy Gannett, supra, 766 F. Supp. at 1146. In that respect, the district court's overly broad declaration that "there is no convincing proof that [RBC] actually has financial backing..." is seen as uniquely belonging to the legally relevant analysis of an injunction hearing, and is inapposite to the factual inquiry here, since Judge Marcus was undoubtedly basing his finding on the fact that RBC had no written financial document.

20. Further distinguishing the district court hearing from the current proceeding is the emphasis in focus. The district court was not evaluating the "reasonable assurance" representations made to the Commission by RBC. Instead, the court, in determining whether an irreparable harm existed, scrutinized whether or not RBC was an "ongoing" business. Id. at 1148. Obviously, RBC failed to meet the high burden of persuasion required to prove the existence of an ongoing

business. Id. With the ultimate concern of the district court's inquiry being the "ongoing" nature of RBC, the court was not, nor should it have been, scrutinizing the details of the RBC financial agreement.

21. The focus of the district court stands in stark contrast to the current proceeding where the ultimate question is RBC's representation that it was and continued to be financially qualified to construct and operate as proposed. That RBC had a legitimate basis for this representation is crucial to this proceeding. See, Georgia Public Telecommunications Commission, 7 FCC Rcd 2942 (Rev. Bd. 1992). The elements used to determine "reasonable assurance" of financing were not within the scope of the district court. Press' attempts to overlay the inquiries of the two forums is wholly unconvincing as noted by the ALJ. See, I.D., par. 112.

22. The ALJ correctly held that the loan agreement was never conditional and that RBC always had reasonable assurance of the loan. I.D., par. 105. Press unconvincingly alleges that the Conant agreement was deficient. However, there is no issue specified, nor is there any evidentiary question regarding Conant's ability to provide the necessary funds. The record clearly demonstrates that RBC had a reasonable belief, and was in

fact correct, that it had secured the requisite financial resources for the construction and operation of Station WRBW-TV throughout the period of time relevant to this proceeding. In satisfying the Commission's financial criteria, Rey negotiated a financing agreement with Conant which provided RBC with access up to \$4 million dollars. This definite and precise financing agreement more than satisfied the Commission's requirements (Tr. 749-752, Rainbow Ex. 5, p.5, par.2). See, International Broadcasting Co., 3 FCC 2d 449, 451 (1966); Connor's Point Broadcasting Co., 93 FCC 2d 643 (Rev. Bd. 1983); Cf., Marlin Broadcasting of Central Florida, Inc., 5 FCC Rcd 5751 (1990).

IV. Ex Parte Issue (Issue 1)

23. This proceeding gained a measure of notoriety from alleged ex parte contacts between RBC and the Commission staff. The evidentiary record revealed nothing that could have been construed as an intentional violation of the ex parte rules, and so the ALJ easily resolved the issue in RBC's favor.⁶

24. Press characteristically perverts an abundance of record evidence in a misguided attempt to show that the ALJ improperly decided the issue. It heavily relies upon the letter

⁶ Even the Separate Trial Staff offered no adverse conclusions under the ex parte issue.

to RBC counsel, Margot Polivy, from the Office of Managing Director ("OMD")⁷ which noted the applicability of the ex parte rules to the RBC proceeding, and then astoundingly concludes that RBC presented no evidence to counter the D.C. Circuit's observation that the OMD letter demonstrated that the FCC considered its ex parte rules to apply to the litigation.⁸

25. The hearing testimony included Polivy's ample explanation regarding her state of mind which, under the specified issue, was the sole matter for consideration. The OMD letter referred to RBC's fifth extension application as a "restricted proceeding" because Press had filed a petition for reconsideration of the grant of that application (Jt. Ex. 4, p.1). The letter was written to one George Daniels who had inquired about the application, and Polivy had been served with a copy. Polivy testified to her belief that the letter was meant to inform Daniels, a third party, that the proceeding was restricted with regard to any contact that he made to the Commission, so that the ex parte rules applied to him (Tr. 383, 406). She had concluded that Section 1.1204(a) of the Rules controlled the proceeding, that a footnote to the rule permitted

⁷ Jt. Ex. 4.

⁸ 59 F.3d at 1370.

oral ex parte communications between the Commission and the formal party involved or its representative, and that the OMD letter, therefore, applied to Daniels who as a third party was barred from oral ex parte contacts with the Commission (Tr. 382-384, 477, Rainbow Ex. 1, p.2). Hence, the record is replete with evidence regarding Polivy's state of mind, and Press' argument otherwise is without merit. The ALJ correctly concluded that her construction of the rules, while ultimately deemed incorrect, nevertheless represented a legitimate and legally supportable belief, I.D., par. 99.⁹

26. Partially underlying the ex parte issue were discussions which Polivy had with Paul Gordon, a staff attorney in the Mass Media Bureau, who had the initial responsibility to review RBC's extension requests, pro forma assignment application and the attendant pleadings (Tr. 1016-1017). Gordon maintained that Polivy placed several telephone calls to him wherein she attempted to address the merits of the pleadings despite his

⁹ The Commission had previously found that Polivy's position had "potential merit" and that the applicability of its rules to this proceeding was not entirely clear, even though Press' petition for reconsideration, based as it was on a prior-filed informal objection, met the "bright line" test for a formal opposition. See, Rainbow Broadcasting Company, 9 FCC Rcd 2839, 2844 and n. 22 (1994). Shortly before the ALJ released the I.D., the Commission substantially amended its ex parte rules to make them simpler and clearer. See, Report and Order, FCC 97-92, released March 19, 1997.